

DRAFT FOR CONSULTATION

Improving Arrangements for Surrogacy Bill

Member's Bill

Explanatory note

General policy statement

This Bill amends five Acts and two sets of Regulations to simplify surrogacy arrangements, ensure completeness of information recorded on birth certificates, and provide a mechanism for the enforcement of surrogacy arrangements.

New Zealand law does not currently afford any automatic rights to the intending parents of a child born via surrogacy. At the time of birth, the child's legal parents are the surrogate mother and partner, and a formal adoption process is required to complete the arrangement. This Bill affirms the intending parents' automatic legal status at the point that custody of the child is transferred. It also enforces the legal obligations of intending parents if they refuse to take custody by making them liable for child support, even if they do not have custody of the child.

The United Nations Convention on the Rights of the Child (UNCROC), ratified by New Zealand in 1993, committed New Zealand to implementing the rights set out in the Convention. These include a child's right from birth to know their parents and to be cared for by them (Article 7.1) and the right to seek and receive information of all kinds (Article 13(1)). This Bill requires the Registrar to also register information about the identity of the surrogate and any person who donated an embryo or cells for the pregnancy. In this way, the Bill recognises the rights of children to know their genetic origins.

Clause by clause analysis

Clause 1 is the title clause.

Clause 2 provides that the Bill comes into force on the day after the date on which it receives the Royal assent.

Part 1

Amendments to Human Assisted Reproductive Technology Act 2004

Part 1 confirms that, although surrogacy arrangements generally remain unenforceable, a surrogacy order under **section 124C** of the Care of Children Act 2004 can be enforced under this Act. The Part amends sections 13 and 14 to make it clear that, although it remains an offence to give or receive valuable consideration for the supply of a human embryo or human gamete, or for participation in a surrogacy arrangement, that does not include payments for the actual and reasonable expenses incurred in doing those things. It expands the functions of the ethics committee to providing approval for surrogacy arrangements for the purpose of obtaining a surrogacy order under the Care of Children Act 2004 and sets out the conditions that must be satisfied before that approval may be provided. This new approval of the ethics committee is separate from, and additional to, the ethics committee approval currently required for fertility treatments for a surrogacy arrangement. This new approval is only required if the parties to a surrogacy arrangement wish to apply to the court for a surrogacy order (provided for in Part 2 of this Bill). Finally, the Part provides for the appointment by the Minister of a Surrogacy Registrar. The primary function of the Surrogacy Registrar is to establish a register for the purpose of facilitating surrogacy arrangements by enabling women who are willing to become surrogates to be matched with intending parents.

Part 2

Amendments to Care of Children Act 2004

Part 2 provides a mechanism for enforcing certain surrogacy arrangements. First, the parties to a surrogacy arrangement may seek to have the terms of a surrogacy arrangement relating to the transfer of custody of any child resulting from the arrangement embodied in a surrogacy order of the court. The court may make a surrogacy order if it is satisfied that both the parties consent and the ethics committee has provided its approval under the Human Assisted Reproductive Technology Act 2004. If the surrogacy is arranged through an overseas provider of fertility services, the court must be satisfied that an entity in that overseas country that is equivalent to the ethics committee has provided written notice that each of the requirements required for ethics committee approval have been met. Second, a surrogacy order may then be enforced under the Care of Children Act 2004 as if it were a parenting order.

Part 3

Amendments to Status of Children Act 1969

Part 3 provides that if a child is born as a result of a surrogacy arrangement that is subject to a surrogacy order under the Care of Children Act 2004, the intending parents automatically become the parents of the child and the surrogate ceases to be a parent of the child from the birth of the child.

Part 4

Amendments to Child Support Act 1991

Part 4 provides that a person who is named as an intending parent under a surrogacy order made under the Care of Children Act 2004 is a parent for the purposes of this Act (and so may be liable to pay child support).

Part 5

Amendments to Births, Deaths, Marriages, and Relationships Registration Act 1995

Part 5 provides that if a child is born as a result of a surrogacy arrangement that is not the subject of a surrogacy order and the intending parents take custody of the child within 2 days of its birth, the intending parents (rather than the surrogate and her partner) have the duty to notify the Registrar of the birth. It also describes the circumstances in which a child born in these circumstances has only one parent for the purposes of this Act. (When a child is born as a result of a surrogacy arrangement that is the subject of a surrogacy order, the intending parents become the legal parents at birth under Part 3 of this bill, so automatically have the duty to notify the Registrar of the birth.) Finally, when a birth is a result of a surrogacy arrangement, this Part requires the Registrar to register information about the identity of the surrogate and any person who donated the embryo or cells for the pregnancy.

Part 6

Amendments to Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995

Part 6 amends the regulations that prescribe the information that must be included on the birth certificate and when notifying a birth to the Registrar. It describes certain information about the surrogate and any donors of embryos or cells that must be notified when a birth is the result of a surrogacy arrangement.

Part 7

Amendments to Social Security (Exemptions under Section 105) Regulations 1998

Part 7 provides that any surrogate who is a beneficiary may apply for an exemption from some or all of her work test obligations under the Social Security Act 1964 if she is at least 27 weeks pregnant or is suffering from complications arising from the pregnancy. In the same circumstances, a surrogate who is subject to the obligations under section 60Q of the Social Security Act 1964 (to prepare for employment etc) may apply to be exempt from those obligations.

Louisa Wall

Improving Arrangements for Surrogacy Bill

Member's Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the **Improving Arrangements for Surrogacy Act 2018**.

2 Commencement

This Act comes into force the day after the date on which it receives the Royal assent.

Part 1

Amendments to Human Assisted Reproductive Technology Act 2004

3 Amendments to Human Assisted Reproductive Technology Act 2004

This Part amends the Human Assisted Reproductive Technology Act 2004.

4 Section 5 amended (Interpretation)

(1) In section 5, insert in their appropriate alphabetical order:

intending parent means a person to whom custody of a child born as a result of a surrogacy arrangement will be transferred

surrogacy order means an order made under **section 124C** of the Care of Children Act 2004

surrogacy register means the register established under **section 66B** of this Act

Surrogacy Registrar means the person, organisation, or department appointed under **section 66A** of this Act

surrogate means a woman who becomes pregnant for the purpose of transferring custody under a surrogacy arrangement of a child born as a result of the pregnancy

- (2) In section 5, in the definition of **surrogacy arrangement**, replace “surrendering custody of a child born as a result of the pregnancy” with “transferring custody of a child born as a result of the pregnancy to the intending parents”; and

5 Section 13 amended (Commercial supply of human embryos of human gametes prohibited)

After section 13(2), insert:

- (3) Subsection (2) does not apply to a payment for the actual and reasonable expenses incurred in the supply of a human embryo or human gamete or as a consequence of supplying a human embryo or human gamete, including the following:
- (a) the costs of counselling:
 - (b) the costs of travel:
 - (c) reimbursement for lost wages or salary.

6 Section 14 amended (Status of surrogacy arrangements and prohibition of commercial surrogacy arrangements)

- (1) In section 14(1), after any person, insert except under
- (2) After section 14(1), insert:
- (1A) To avoid doubt, a surrogacy order under **section 124C** of the Care of Children Act 2004 may, so far as it relates to custody of the child, be enforced under that Act as if it were a parenting order related to contact.
- (3) Replace section 14(4) with
- (4) Subsection (3) does not apply to a payment for the actual and reasonable expenses of making a surrogacy arrangement, treatments to become pregnant, or incurred as a result of a pregnancy arising under a surrogacy arrangement, including the following:
- (a) payments to a provider of fertility treatment (including counselling related to a surrogacy arrangement or pregnancy):
 - (b) payments for legal advice to the woman who is, or who might become, pregnant under the surrogacy arrangement:
 - (c) the costs of travel:
 - (d) the reimbursement of lost wages or salary.

7 New section 23A and cross-heading inserted

After section 23, insert:

*Approval of surrogacy arrangement for the purposes of surrogacy order***23A Approval of surrogacy arrangement for the purposes of surrogacy order**

- (1) The ethics committee may receive a written application for approval of a surrogacy arrangement for the purposes of obtaining a surrogacy order under **Part 2A of the Care of Children Act 2004** if the application is in a form approved by the ethics committee.
- (2) The ethics committee may give its written approval of a surrogacy arrangement for the purposes of obtaining a surrogacy order under **Part 2A of the Care of Children Act 2004** if it is satisfied of each of the following:
 - (a) the woman who would be the surrogate will not be a genetic parent of any child resulting from the surrogacy;
 - (b) the woman who would be the surrogate and the intending parents have each received medical advice;
 - (c) any health risks associated with a surrogacy for the adult parties and any resulting child are justified;
 - (d) the woman who would be the surrogate and the intending parents have each received independent legal advice and clearly understand the legal consequences of a surrogacy order;
 - (e) the woman who would be the surrogate and the intending parents have each received counselling in accordance with the current Fertility Services Standard;
 - (f) the woman who would be the surrogate and the intending parents have agreed the following matters:
 - (i) the timing and manner of transfer of custody of the child; and
 - (ii) the nature of information about the pregnancy and the foetus that the surrogate will disclose to the intending parents; and
 - (iii) the method by which that information will be disclosed;
 - (g) the risks that the woman who would be the surrogate may change her mind about transferring custody of any resulting child or that the intending parent or parents may change their minds about taking custody of any resulting child have been carefully considered by all the parties and are small.
- (3) In this section, **Fertility Services Standard** means the standard approved by the Minister under section 13 of the Health and Disability Services (Safety) Act 2001 for the provision of fertility services.

8 Section 28 amended (Functions of ethics committee)

After subsection 28(1)(d), insert:

- (da) to consider and determine whether to provide approval of a surrogacy arrangement:

9 New section 66A and cross heading inserted

After section 66, insert:

*Surrogacy register***66A Appointment of Surrogacy Registrar**

- (1) The Minister may, by notice in writing,—
- (a) appoint any person, organisation, or department as the Surrogacy Registrar for the purposes of this Act:
 - (b) prescribe the functions of the Surrogacy Registrar that are in addition to the functions specified in **section 66B**:
 - (c) prescribe any reporting requirements, accountability measures, or other terms or conditions that the Surrogacy Registrar must comply with.
- (2) Before making an appointment under **subsection (1)(a)**, the Minister must be satisfied that the appointee has the appropriate knowledge, skills, and experience to carry out the functions of the Surrogacy Registrar under this Act.
- (3) The Surrogacy Registrar holds office for the term specified by the Minister in the notice of appointment under **subsection (1)**.
- (4) As soon as practicable after making an appointment under **subsection (1)(a)**, the Minister must give notice of the appointment by notice in the Gazette.

66B Functions, powers and duties of Surrogacy Registrar

- (1) The functions of the Surrogacy Registrar are—
- (a) to establish and maintain a surrogacy register for the purpose of facilitating surrogacy arrangements by enabling women who are willing to become surrogates and intending parents to be matched:
 - (b) to receive applications for registration from women who are willing to become surrogates and from intending parents:
 - (c) to register, if the Surrogacy Registrar considers it appropriate, the details of women who are willing to become a surrogate, including the reasons she wishes to become a surrogate and what characteristics she is seeking in intending parents:
 - (d) to register, if the Surrogacy Registrar considers it appropriate, the details of intending parents, including the reasons they wish to engage the services of a surrogate and what characteristics they are seeking in a surrogate:

- (e) to adopt a process to match women who are willing to become a surrogate and intending parents on the basis that the characteristics each party is seeking in the other party matches the characteristics of the other party;
 - (f) to facilitate a meeting between matched women who are willing to become a surrogate and intending parents for the purpose of the parties determining whether they wish to enter into a surrogacy arrangement.
- (2) The Surrogacy Registrar—
 - (a) must remove the details of any person from the register if the Surrogacy Registrar is notified by that person that they no longer wish to be registered on the register;
 - (b) may remove the details of any person from the register if the Surrogacy Registrar considers that there is good reason to remove those details from the register.

66C Fee for registration on the surrogacy register

The Surrogacy Registrar may charge the prescribed fee to any intending parent applying for registration on the surrogacy register.

66D Delegation of Surrogacy Registrar's functions, powers, and duties

- (1) The Surrogacy Registrar may delegate to any person or organisation any of its functions, powers, and duties except this power of delegation.
- (2) Before delegating any functions, powers, or duties, the Surrogacy Registrar must be satisfied that the delegate has the appropriate knowledge, skills, and experience to carry out those functions and powers.
- (3) A delegation—
 - (a) must be in writing; and
 - (b) is subject to any restrictions and conditions specified by the Surrogacy Registrar that the Registrar thinks fit; and
 - (c) is revocable at any time, in writing; and
 - (d) does not prevent the performance or exercise of a function, power, or duty by the Surrogacy Registrar.
- (4) A person or organisation performing or exercising any delegated functions, powers, or duties may perform and exercise them in the same manner and with the same effect as if they had been conferred directly by this Act and not by delegation.
- (5) A person or organisation who acts under a delegation given under this section is presumed to be acting in accordance with its terms in the absence of evidence to the contrary.
- (6) Any action or decision of a delegate under the delegation is treated as an action or decision of the Surrogacy Registrar under this Act.

66E Protection for employees of Surrogacy Registrar

- (1) This section applies if the Surrogacy Registrar is not a department.
- (2) If this section applies, no civil action lies against the Surrogacy Registrar, a delegate of the Surrogacy Registrar, or any employee of the Surrogacy Registrar or delegate for any act done or omitted by that person in good faith in the performance or intended performance of the functions, powers, or duties of the Surrogacy Registrar.
- (3) However, subsection (2) does not prevent a person from filing an application for review under section 8 of the Judicial Review Procedure Act 2016 in relation to the exercise, refusal to exercise, or proposed or purported exercise by the Surrogacy Registrar, delegate, or employee of the Surrogacy Registrar or delegate of a statutory power within the meaning of that Act or otherwise affect the operation of that Act.

10 Section 76 amended (Regulations)

After section 76(1)(c), insert:

- (ca) prescribing the fees to be paid by intending parents applying to register their details on the surrogacy register.

Part 2**Amendments to Care of Children Act 2004****11 Amendments to Care of Children Act 2004**

This Part amends the Care of Children Act 2004.

12 Section 8 amended (Interpretation)

In section 8, insert in its appropriate alphabetical order:

surrogacy order means an order made under **section 124C**

13 Section 77 amended (Preventing removal of child from New Zealand)

- (1) In section 77(2)(b), replace “complied with.” with “complied with; or”.
- (2) After section 77(2)(b), insert:
 - (c) prevent a surrogacy order from being complied with.

14 Section 77B amended (Orders under section 77(3)(c) may be suspended for specified period)

After section 77B(3), insert:

- (4) This section does not apply if the order made under section 77(3)(c) (that the child not be removed from New Zealand) was made to prevent the non-compliance with a surrogacy order.

15 Section 78 amended (Contravening parenting or guardianship order)

- (1) In the heading to section 78, replace “parenting or guardianship” with “parenting, guardianship, or surrogacy”.
- (2) After section 78(1)(a)(ii), insert:

(iii) a surrogacy order; or
- (3) In section 78(1)(b)(ii), replace “46R.” with “46R; or”
- (4) After section 78(1)(b)(ii), insert:

(iii) a surrogacy order.

16 Section 80 amended (Taking child from New Zealand)

- (1) In section 80(c), replace “complied with.” with “complied with; or”
- (2) After section 80(c), insert:

(d) with intent to prevent a surrogacy order from being complied with.

17 New Part 2A inserted

After section 124, insert:

Part 2A
Surrogacy orders

124A Interpretation

In this Part, **intending parent**, **surrogacy arrangement**, and **surrogate** have the same meanings as in section 5 of the Human Assisted Reproductive Technology Act 2004.

124B Arrangements between surrogates and intending parents

- (1) A surrogacy arrangement cannot be enforced under this Act, but a party to a surrogacy arrangement may seek to have the terms of the arrangement that relate to the transfer of custody of any child resulting from the arrangement embodied in an order of the court made under **section 124C**.
- (2) An order under **section 124C** may, so far as it relates to custody of the child, be enforced under this Act as if it were a parenting order.

124C Surrogacy orders

- (1) On an application made to it for the purpose by some or all of the parties to a surrogacy arrangement, the court may make a surrogacy order determining that the custody of any child resulting from a pregnancy under the surrogacy arrangement must transfer from the surrogate to the intending parents within ten days of the birth of the child.
- (2) The court may make the order under **subsection (1)** only if it is satisfied of the following—

- (a) both the surrogate and the intending parents consent to be legally bound by the surrogacy arrangement;
- (b) either—
 - (i) the ethics committee has provided approval in writing under **section 23A(2)** of the Human Assisted Reproductive Technology Act 2004 for the surrogacy arrangement; or
 - (ii) if the surrogacy arrangement involves an assisted reproductive procedure performed by an overseas provider of fertility services, an entity in that overseas country that performs equivalent functions to the ethics committee has provided written notice that it is satisfied that each of the requirements described in **section 23A(2)** of the Human Assisted Reproductive Technology Act 2004 have been met.

124D Content and explanation of surrogacy orders

- (1) An order under **section 124C(1)**—
 - (a) must contain an explanation, based on the precise terms of the particular order, of—
 - (i) the effect of the order (for example, of the obligations the order creates); and
 - (ii) the consequences that may follow if the order is not complied with; and
 - (b) without limiting **paragraph (a)**, must be accompanied by general information, in a form approved by the Secretary, about the matters stated in **paragraph (a)(i) and (ii)**.
- (2) A lawyer acting for, or other person representing, a party to an order under **section 124C(1)** must explain to the party the effect of the order.
- (3) Explanations required by **subsections (1)(a) and (2)** must be given in a manner and in language that the recipients of those explanations understand.
- (4) A failure to comply with a requirement imposed by this section does not affect the validity of the order concerned.

Part 3

Amendments to Status of Children Act 1969

18 Amendments to Status of Children Act 1969

This Part amends the Status of Children Act 1969.

19 New section 22A and cross-heading inserted

After section 22, insert:

*Rule about surrogacy arrangements***22A Rule about surrogacy arrangements**

- (1) This section applies if—
 - (a) a woman becomes pregnant as a result of a surrogacy arrangement; and
 - (b) the surrogacy arrangement is the subject of a surrogacy order made under **section 124C** of the Care of Children Act 2004; and
 - (c) the pregnancy results in the birth of a living child.
- (2) From the birth of the child, the following apply:
 - (a) the surrogate and any partner of the surrogate are not, for any purpose, parents of any child of the pregnancy and no longer have the rights and liabilities of parents of the child:
 - (b) the intending parents are, for every purpose, the parents of any child of the pregnancy and have all the rights and liabilities of parents of the child:
 - (c) the child has, in relation to the intending parents, the rights and liabilities of a child of those persons.
- (3) Sections 17 to 22 are subject to this section.
- (4) For the avoidance of doubt, **subsection (2)** applies in the circumstances described in **subsection (1)** even if the surrogacy arrangement involves an assisted reproductive procedure performed by an overseas provider of fertility services.
- (5) In this section, **intending parent**, **surrogacy arrangement**, and **surrogate** have the same meanings as in section 5 of the Human Assisted Reproductive Technology Act 2004.

Part 4**Amendments to Child Support Act 1991****20 Amendments to Child Support Act 1991**

This Part amends the Child Support Act 1991.

21 Section 7 amended (Meaning of parent)

- (1) In section 7(1)(i), replace “set aside.” with “set aside; or”.
- (2) After subsection 7(1)(i), insert:
 - (j) the person is an intending parent under a surrogacy order made under **section 124C** of the Care of Children Act 2004.

Part 5

Amendments to Births, Deaths, Marriages, and Relationships Registration Act 1995

22 Amendments to Births, Deaths, Marriages, and Relationships Registration Act 1995

This Part amends the Births, Deaths, Marriages, and Relationships Registration Act 1995.

23 Section 2 amended (Interpretation)

In section 2, insert in their appropriate alphabetical order:

intending parent has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004

surrogacy arrangement has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004

surrogate has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004

24 Section 9 amended (Parents primarily responsible for notifying birth)

(1) After section 9(1), insert:

(1A) **Subsection (1B)** applies if—

- (a) a child is born as a result of a surrogacy arrangement that is not the subject of a surrogacy order made under **section 124C** of the Care of Children Act 2004; and
- (b) the intending parents have taken custody of the child within ten days of its birth.

(1B) In those circumstances, subsection (1) does not apply and the intending parents must, as soon as reasonably practicable after taking custody of the child,—

- (a) jointly notify a Registrar of the birth in accordance with this Act; and
- (b) inform the Registrar whether or not, to the best of their knowledge, either or both of the intending parents are New Zealand citizens or persons entitled, under the Immigration Act 2009, to be in New Zealand indefinitely.

(2) After section 9(4), insert:

(5) However, if the child is born as a result of a surrogacy arrangement, a child has 1 parent at law if—

- (a) there is only 1 intending parent; and
- (b) the donor of the ovum, embryo, or semen (as the case may be) for the pregnancy does not become the partner of the intending parent before the birth is notified for registration.

25 New section 15AA inserted (Registration of details of donors of embryos or cells in surrogacy arrangements)

After section 15, insert:

15AA Registration of details of donors of embryo or cells in surrogacy arrangements

- (1) This section applies if a child is born as a result of a surrogacy arrangement and the pregnancy under that arrangement used donated embryo or donated cells.
- (2) A Registrar who is authorised by the Registrar-General to register births must register, as part of the birth information of a child, any information about the identity of the following people that is notified to the Registrar:
 - (a) the surrogate;
 - (b) any person who donated the embryo or the cells.

Part 6

Amendments to Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995

26 Amendments to Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995

This Part amends the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995.

27 Regulation 2 amended (Interpretation)

In regulation 2, insert in their appropriate alphabetical order:

donor has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004

surrogacy arrangement has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004

surrogate has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004

28 Regulation 3A amended (Notification of birth for registration)

- (1) In regulation 3A(c)(viii), replace “signatures.” with “signatures; and”.
- (2) After regulation 3A(c), insert:
 - (d) if the birth is a result of a surrogacy arrangement, in relation to the surrogate and any donors of embryos or cells,—
 - (i) the surrogate or donor’s address:

- (ii) whether the surrogate or the donor is a descendant of a New Zealand Māori (if known):
- (iii) the surrogate or donor's ethnic group or groups:
- (iv) the surrogate or donor's citizenship or residency status:
- (v) the date, place and country of the surrogate or donor's birth:
- (vi) the type of cells donated.

Part 7

Amendments to Social Security (Exemptions under Section 105) Regulations 1998

29 Social Security (Exemptions under Section 105) Regulations 1998 amended

This Part amends the Social Security (Exemptions under Section 105) Regulations 1998.

30 Regulation 2 amended (Interpretation)

In regulation 2(1), insert in its appropriate alphabetical order:

surrogate has the same meaning as in section 5 of the Human Assisted Reproductive Technology Act 2004

31 Regulation 3A amended (Exemption from obligations under section 60Q)

After regulation 3A(2)(d), insert:

- (da) the person is a surrogate and is—
 - (i) at least 27 weeks pregnant; or
 - (ii) less than 27 weeks pregnant, if the chief executive is satisfied that the person is suffering from complications arising from the pregnancy; or

32 Regulation 4 amended (Exemption from work test obligations: all work-tested beneficiaries)

(1) In regulation 4(2)(g)(iii), replace “ended.” with “ended; or”.

(2) After regulation 4(2)(g), insert:

- (h) the person is a surrogate and is—
 - (i) at least 27 weeks pregnant; or
 - (ii) less than 27 weeks pregnant, if the chief executive is satisfied that the person is suffering from complications arising from the pregnancy.